

No. 1-08-3156

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 07 CR 22565
)	
DANELL WALKER,)	Honorable
)	Dennis J. Porter,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Justices Joseph Gordon and Fitzgerald Smith concurred in the judgment.

ORDER

- ¶ 1 *Held:* Judgment entered on defendant's conviction for possession of a stolen motor vehicle affirmed over challenges to sufficiency of evidence, denial of pretrial motion to suppress, and length of MSR terms; \$20 Violent Crime Victims Assistance fine and \$200 DNA fee vacated.
- ¶ 2 Following a bench trial, defendant Danell Walker was convicted of possession of a stolen motor vehicle (PSMV), then sentenced as a Class X offender to 14 years' imprisonment and assessed fines and fees totaling \$550. On appeal, defendant contends that: (1) the trial court erred in denying his motion to suppress identification; (2) the State failed to prove him guilty of

PSMV beyond a reasonable doubt; (3) his mandatory supervised release term (MSR) should be reduced from three years to two years; and (4) he was improperly assessed a \$200 DNA analysis fee and a \$20 fine under the Violent Crime Victims Assistance Act (Act).

¶ 3 We initially affirmed defendant's conviction on March 18, 2011, and found the assessment of a \$200 DNA fee proper notwithstanding that the Illinois State Police already had his DNA profile from a prior felony conviction. *People v. Walker*, No. 1-08-3156 (2011) (unpublished order under Supreme Court Rule 23). Thereafter, the supreme court entered a supervisory order directing this court to vacate that order and reconsider the matter in light of *People v. Marshall*, 242 Ill. 2d 285 (2011). We have done so, and, as will be explained below, we conclude that defendant's \$200 DNA fee must be vacated.

¶ 4 The charges in this case arose from a vehicle theft on October 9, 2007, and were filed after the victim identified defendant in a pretrial lineup one week later. Prior to trial, defendant filed a motion to suppress that identification, and a hearing was held on June 4, 2008.

¶ 5 At the hearing, defendant testified that prior to the lineup, he and three others had been arrested and taken to the police station where they were handcuffed to a bench in the gang tactical unit room (tactical room), which he described as an office-like area containing desks and computers. He remained in that room for about two hours before he was taken to a smaller room about the size of a cell, with a square window inside. There, he was interrogated by an officer, and eventually brought back to the tactical room.

¶ 6 About five or ten minutes before the lineup, defendant saw a woman, whom he had never seen before, looking into this room through a window, and an officer pointing towards the four suspects seated there. Both the woman and the officer "got to smirking," and, subsequently, defendant was brought into the smaller room for the lineup. He testified that the woman he saw

that night was the complaining witness at his preliminary hearing, but he could not remember what the officer looked like.

¶ 7 On cross-examination, defendant described the window in the room as about 9' by 100', and related that the woman looking through it was wearing jogging pants and a white top. He stated that she looked at him for about two minutes, and that she and the officer were smirking the whole time. He also described the metal door to the small room where the lineup occurred as having a window at the top with a metal object for covering and opening the window. He did not see who viewed the lineup or observe any officer point in his direction during it, and stated that he was further interrogated after the lineup. On redirect, defendant testified that he was not absolutely certain as to what the woman in the window was wearing.

¶ 8 Chicago police officer Pruszewski testified that about 11 p.m., on October 15, 2007, he and his partner curbed a 2004 Hyundai in which defendant was a passenger and arrested him along with the other occupants of the car. They brought them to the police station and placed them in the tactical room, in which there is a clock, two desks, chairs, and computers, but no windows on the walls or door. About an hour later, defendant was placed in a holding cell in the juvenile office, which is about the same size as the tactical room. The only window in that cell is a small one on the door which is kept shut and has a metal object for opening and closing it. Defendant was never moved back into the tactical room. Officer Pruszewski contacted the victim, Shalisa Harvey, and his partner prepared for the lineup by moving the other three suspects into the holding cell in the juvenile office.

¶ 9 When Harvey arrived, defendant and the three other individuals were already inside the holding cell, and had been for one to two hours. Officer Pruszewski met with the victim at the front desk, explained to her that she would be viewing a lineup, informed her that she did not have to pick anyone from the lineup, and told her not to assume that the person who took her car

was in the lineup, or that he knew who took her car. He was present when Harvey viewed the lineup, and before opening the holding cell window, he turned off the lights in the room. Harvey then identified defendant from the lineup as the individual who took her car on October 9, 2007.

¶ 10 Officer Pruszewski testified that it would have been impossible for Harvey to have seen defendant or the three others in the lineup beforehand because there were multiple walls separating them and no windows. He also never saw Harvey with another officer looking at any of the suspects through a 9 by 100 foot window in the tactical room.

¶ 11 On cross-examination, Officer Pruszewski testified that the only large floor to ceiling window is in the area between the tactical room and the juvenile office, and in that area, there is one table and four chairs. He acknowledged that he was not with defendant at all times that night, and that he did not speak with him after the lineup took place.

¶ 12 The court found that Officer Pruszewski testified credibly, adopted his testimony, and denied defendant's motion to suppress identification. The court found there was no way a witness could have seen defendant or that an officer would have known which person to point out, and noted that the lineup was within "satisfactory parameters."

¶ 13 At the ensuing bench trial, Shalisa Harvey testified that she owns, in her husband's name, a silver 2004 Hyundai Sonata with Illinois license plate 8484315, for which she alone holds the keys. About 7:45 a.m., on October 9, 2007, she was dropping her five-year-old son off at her aunt's house, and drove her vehicle up the driveway to the back of the house. She then left her keys and other personal belongings in the car while she walked her son to the door. When she reached the door, Harvey saw that her son's face was dirty, so she stepped inside, asked her aunt for a paper towel, and began cleaning off his face. As she was doing this, she heard a car pulling out, and when she turned around, she did not see her car and ran outside where the car was being backed out of the driveway about 30 feet away. In daylight, without obstruction, she saw

defendant looking straight at her, and viewed him for one to three minutes as he drove the vehicle out of the driveway. She had never seen him before, or given him permission to use the vehicle, which had no damage before it was stolen. Harvey screamed and went inside the house to call police.

¶ 14 On October 16, 2007, a police officer came to Harvey's door, and, about 2 a.m. the following day, she met with Officer Pruszewski at the 4th district police station. He told her that she would be viewing a lineup, that she should not assume that the person who took her car was in the lineup, that she should not assume that he knew who took her car, and that she did not have to pick anybody out of the lineup. Officer Pruszewski did not tell her who to choose, and she identified defendant from a lineup of four individuals.

¶ 15 Afterward, Harvey was taken to her vehicle, which was parked at the police station. She noticed new damage to it, including scratches along the sides, a dent in the front, yellow paint at the bottom of the front passenger-side, a cracked windshield, and a broken antenna. She also noticed that her belongings were missing, including her purse, cell phone, digital camera, and compact discs.

¶ 16 On cross-examination, Harvey testified that she parked her vehicle about two-thirds of the way into the driveway and left it running. The incident happened quickly, but she was able to see defendant's facial features and noted that he was wearing a black skull cap. She first described the car thief to the 911 operator as wearing a black skull cap with tan or blue writing on it, but next described him as a black male with a gray jacket and a skull cap with orange writing on it.

¶ 17 Prior to the lineup, neither Officer Pruszewski, the Calumet City police officer who came to her door, nor any other officer mentioned that they had arrested anyone or how they had recovered the vehicle. During the lineup, her brother and an officer were in the room with her,

but did not make any comments. Harvey viewed the lineup for less than 15 minutes and was very sure that defendant was the individual who took her vehicle.

¶ 18 On redirect, Harvey testified that she could not remember the color of the writing on defendant's skull cap because she was upset that her car had been stolen, and stated that she had been focusing on defendant's eyebrows and eyes. She also testified that she recognized defendant right away in the lineup.

¶ 19 On recross, Harvey testified that when her car was taken, she was upset, but not panicked. When she called 911, she was crying and out of breath from running, but was not necessarily having trouble calming down. On redirect, Harvey testified that she was not crying at the time defendant drove her car away.

¶ 20 Officer Pruszewski testified that about 11:30 a.m., on October 15, 2007, he and his partner were in an unmarked police car traveling southbound on Brandon Avenue and monitoring their radio. When they reached 83rd Street, they observed a silver Hyundai Sonata, license plate 8484315, matching the description given by the dispatcher, and they curbed it about one block east on 83rd Street. Officer Pruszewski approached the passenger side of the car where defendant was sitting, and saw his co-defendant, Carl Collins, in the driver's seat, and two passengers in the back. The officers arrested all four individuals, who were then taken to the police station. Officer Pruszewski drove the Hyundai to the station, and noted that it had a cracked windshield and a dirty interior, but did not know who had taken Harvey's car.

¶ 21 At the station, Officer Pruszewski called the Calumet City police department, and about 2 a.m., on October 16, 2007, Harvey came to view the lineup, which included defendant, his co-defendant, and two others. Officer Pruszewski told Harvey not to assume the person that took her car was in the lineup, or that he knew who took her car, and that she did not have to pick anyone out. He also did not tell her who to choose.

¶ 22 During the lineup, Officer Pruszewski stood to the right of Harvey, and Harvey's brother stood to her left. He told Harvey to nod if she saw someone that she recognized, and she did so when she saw defendant. He then had a conversation with her in which she identified defendant as the person who stole her car. Afterward, Officer Pruszewski took Harvey to the car, and she identified it as the one stolen from her and drove it home.

¶ 23 On cross-examination, Officer Pruszewski testified that Harvey called him at the station after the Calumet City police had gone to her house. He told her that he had her vehicle and asked her to tell him what had happened on the day her car was stolen. He told her that there were people in custody and asked if she would be able to identify the thief in a lineup, and she responded that she could.

¶ 24 The State recalled Harvey, who clarified that she was contacted by the Calumet City police department on the night of October 15, 2007, arrived at the police station to view the lineup at 2:00 a.m. the next day, and viewed the lineup about 30 minutes after her arrival.

¶ 25 The defense rested without presenting any testimonial evidence, and the court found defendant guilty of PSMV. In doing so, the court determined that Harvey was a credible and positive witness, and that her testimony was accurate. Based on his prior felony convictions, the trial court sentenced defendant as a Class X offender (730 ILCS 5/5-5-3(c)(8) (West 2008)) to 14 years' imprisonment and three years of MSR (730 ILCS 5/5-8-1(d)(1) (West 2008)).

¶ 26 In this appeal from that judgment, defendant first contends that the trial court erred in denying his motion to suppress identification, claiming that the lineup was impermissibly suggestive because it contained all suspects, was performed simultaneously with a small sample, was conducted by the arresting officer, and that, under the circumstances, Harvey would have been aware that the individuals in the lineup were arrested in connection with her car.

¶ 27 Under the two-part standard of review for considering the propriety of a trial court's ruling on a motion to suppress, the deferential manifest weight standard is applied to the court's factual findings. *People v. Luedemann*, 222 Ill. 2d 530, 542 (2006). However, we review *de novo* the trial court's ultimate legal ruling on the motion to suppress. *Luedemann*, 222 Ill. 2d at 542.

¶ 28 In a motion to suppress identification testimony, the burden is on defendant to prove that the pretrial identification was impermissibly suggestive, and it will only be excluded by law on due process grounds where it is impermissibly suggestive to the extent that it produced a very substantial likelihood of irreparable misidentification. *People v. Love*, 377 Ill. App. 3d 306, 311 (2007).

¶ 29 Defendant first takes issue with the composition of the lineup, claiming that it was impermissibly suggestive because it contained all suspects. However, each of the four suspects arrested in Harvey's car was a black male of similar appearance, and, even though defendant was the only one with braids in his hair, that alone does not make a lineup impermissibly suggestive. *Love*, 377 Ill. App. 3d at 311. The record further shows that there is no evidence that Harvey knew that any of the individuals in the lineup were suspects arrested in connection with her car. As defendant has not cited any case law holding that a lineup composed of suspects is impermissibly suggestive, we find no support in fact, or in law, for that contention here. *Love*, 377 Ill. App. 3d at 311.

¶ 30 Defendant also takes issue with the fact that the lineup was performed simultaneously, rather than sequentially, and consisted of a small sample. However, defendant cites no case holding that a lineup is *per se* impermissibly suggestive when it is performed simultaneously, or when it consists of four individuals, and we find no basis in the record for concluding that the lineup at issue was impermissibly suggestive on either basis. *Love*, 377 Ill. App. 3d at 311.

¶ 31 Defendant next objects to the fact that the lineup was conducted by the arresting officer. However, both Harvey and Officer Pruszewski testified that she had been told not to assume the person that took her car was in the lineup, not to assume that Officer Pruszewski knew who took her car, and that she did not have to pick anyone out. She was also never told who to choose from the lineup, or that the individuals in the lineup were arrested in her car. Thus, there is no evidence in the record that Officer Pruszewski pressured or persuaded Harvey to choose defendant from the lineup, and defendant cites no case law supporting his objection. We thus find that Officer Pruszewski's involvement in conducting the lineup did not render it impermissibly suggestive. *Love*, 377 Ill. App. 3d at 311.

¶ 32 Defendant finally contends that the lineup was impermissibly suggestive because Harvey would have been aware, under the circumstances, that the individuals in the lineup were arrested in connection with her car where she was told that the police had her vehicle and had people in custody. This claim is purely speculative since there is no evidence that she actually was aware that any of the men in the lineup were arrested in her car. Moreover, Officer Pruszewski's admonishment to Harvey before the lineup made clear that the person who stole her car was not necessarily in the lineup, and that she was not required to choose anyone from it. Having found no indication that the lineup at issue was impermissibly suggestive, we conclude that the trial court properly denied defendant's motion to suppress. *Luedemann*, 222 Ill. 2d at 542; *Love*, 377 Ill. App. 3d at 311.

¶ 33 Defendant next argues that the State did not prove him guilty of PSMV beyond a reasonable doubt. He particularly contends that Harvey's lineup identification of him was unreliable.

¶ 34 Where, as here, defendant challenges the sufficiency of the evidence to sustain his conviction, the question for the reviewing court is whether, after viewing the evidence in the light

most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Jordan*, 218 Ill. 2d 255, 269 (2006). It is the responsibility of the trier of fact to determine the credibility of the witnesses and the weight to be given their testimony, to resolve any inconsistencies and conflicts in the evidence, and to draw reasonable inferences therefrom. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). A reviewing court will not overturn the decision of the trier of fact unless the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of defendant's guilt. *People v. Smith*, 185 Ill. 2d 532, 542 (1999).

¶ 35 We observe that a single witness' identification of defendant is sufficient to sustain his conviction if the witness viewed him under circumstances permitting a positive identification. *People v. Lewis*, 165 Ill. 2d 305, 356 (1995). In assessing the reliability of the identification, we consider: (1) the witness' opportunity to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the witness' level of certainty at the identification confrontation; and (5) the length of time between the crime and the identification confrontation. *Lewis*, 165 Ill. 2d at 356.

¶ 36 Viewed in the light most favorable to the prosecution, the evidence clearly shows that defendant possessed Harvey's car with knowledge that it was stolen in violation of 625 ILCS 5/4-103(a)(1) (West 2006). The evidence shows that Harvey witnessed the theft of her car at 7:45 a.m., in broad daylight. When she saw her car being backed out of the driveway, she was 30 feet away and saw defendant looking straight at her. Her testimony shows that her degree of attention was high since both the car and the possessions inside were her personal property. These factors militate in favor of reliability. *People v. Slim*, 127 Ill. 2d 302, 311 (1989). Although she initially described the car thief as a black male wearing a gray jacket and skull cap, then gave varying color descriptions of the lettering on it, those discrepancies and general initial

description do not raise a reasonable doubt where she made a positive identification of defendant based on her view of him at the time and remained consistent with that identification throughout the trial. *Slim*, 127 Ill. 2d at 309.

¶ 37 Her level of certainty in identifying defendant at the lineup was also very high, and, at trial, she testified that she was "very sure" that defendant took her car and that she recognized him right away in the lineup. Finally, the length of time between the theft of her car and the lineup was about one week, which is not an inordinate amount of time and, in any event, only goes to the weight of the testimony. *People v. Holmes*, 141 Ill. 2d 204, 242 (1990). We thus find, under these circumstances, that Harvey's identification of defendant as the individual who stole her car was sufficiently reliable (*Lewis*, 165 Ill. 2d at 356), and thus affirm his conviction for possession of a stolen vehicle.

¶ 38 Defendant next claims that the trial court erroneously sentenced him to three years of MSR. We initially note that defendant's mittimus does not reflect the existence of a MSR term. However, as defendant points out, the website for the Illinois Department of Corrections indicates that he is subject to a three-year term of MSR, and we may take judicial notice of that record. *People v. Sanchez*, 404 Ill. App. 3d 15, 17 (2010).

¶ 39 Defendant does not contest the fact that he was sentenced as a Class X offender *per se*, but rather, contends that his MSR term is determined by the class of the underlying conviction, in this case, a Class 2 felony, and thus should be reduced. Although defendant failed to properly preserve this issue for review, he maintains that the State is seeking to enforce a void order which may be challenged at any time. *People v. Thompson*, 209 Ill. 2d 19, 27 (2004). This issue raises a question of law, which we review *de novo*. *People v. Artis*, 232 Ill. 2d 156, 161 (2009).

¶ 40 As noted, defendant was convicted of possession of a stolen vehicle, a Class 2 felony (625 ILCS 5/4-103(b) (West 2006)); however, the trial court was required to sentence him as a

Class X offender because of his two prior convictions of Class 2 felonies. 730 ILCS 5/5-5-3(c)(8). By statute, the MSR term for a Class X felony is three years (730 ILCS 5/5-8-1(d)(1)), and two years for a Class 2 felony (730 ILCS 5/5-8-1(d)(2)).

¶ 41 His present argument for a comparable reduction of MSR has been previously addressed by this court and rejected. In *People v. Anderson*, 272 Ill. App. 3d 537, 541-42 (1995), we affirmed the three-year MSR term based on our finding that the gravity of conduct offensive to the public safety and welfare which authorizes Class X sentencing requires lengthier watchfulness after prison release than less serious violations. Our sister districts have reached this same result. *People v. Watkins*, 387 Ill. App. 3d 764, 767 (2009); *People v. Smart*, 311 Ill. App. 3d 415, 417-18 (2000).

¶ 42 Defendant nonetheless takes issue with these holdings and cites to the supreme court's decision in *People v. Pullen*, 192 Ill. 2d 36 (2000). In that case, the supreme court held that defendant's maximum consecutive sentence is determined by the classification of the underlying felonies. *Pullen*, 192 Ill. 2d at 46. However, we find *Pullen* inapposite to the case at bar because the issue here is not the maximum consecutive sentence to be imposed, but the proper MSR term to be applied. We thus continue to find that defendant is subject to a three-year MSR term as part of his Class X sentence. *People v. Rutledge*, 409 Ill. App. 3d 22, 26 (2011).

¶ 43 Defendant finally contends that the trial court improperly assessed him certain fines and fees. Although the State responds that defendant has forfeited this issue for review, we observe that a sentence that does not conform to a statutory requirement is void, and that a challenge to a void order is not subject to forfeiture. *People v. Jackson*, 2011 IL 110615, ¶10, and cases cited therein. Accordingly, we shall consider the propriety of the court-ordered fines and fees in this case, a question of statutory interpretation which we review *de novo*. *People v. Price*, 375 Ill. App. 3d 684, 697 (2007).

¶ 44 Defendant contends that he was improperly assessed a \$200 DNA analysis fee because the Illinois State Police already had his DNA profile from a prior felony conviction. We agree. Pursuant to the supreme court's ruling in *Marshall*, 242 Ill. 2d at 303, the trial court was not authorized to assess defendant the \$200 DNA fee where he is currently registered in the DNA database. We therefore vacate that fee.

¶ 45 Defendant also contends that the trial court erred in assessing him a \$20 fine under section 10(b) of the Act (725 ILCS 240/10(b) (West 2008)) where the only other fine assessed to him was under section 10(c) of the Act (725 ILCS 240/10(c) (West 2008)). The State concedes that this fine should be vacated, and we agree that under the supreme court's holding in *People v. Jamison*, 229 Ill. 2d 184, 192-93 (2008), fines should not be imposed under both section 10(b) and 10(c), but rather, one or the other. We thus vacate the \$20 fine under section 10(b) because it does not apply when the only other assessed fine was entered pursuant to section 10(c). *Jamison*, 229 Ill. 2d at 192-93.

¶ 46 We therefore vacate the \$20 fine under section 10(b) of the Act and the \$200 DNA fee, and affirm the judgment in all other respects.

¶ 47 Affirmed in part; vacated in part.